Newlonbro, LLC (Connecticut's Own) Milford *and* Local 1040, International Brotherhood of Teamsters, AFL–CIO. Case 34–CA–8913

December 29, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On May 4, 2000, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Newlonbro, LLC (Connecticut's Own) Milford, Milford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Darryl Hale, Esq., for the General Counsel.
Thomas R. Gibbons, Esq. (Jackson, Lewis, Schnitzler Krupman), for the Respondent.
Dennis Novak, Secretary/Treasurer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on January 18 and 19, 2000. Local 1040, International Brotherhood of Teamsters, AFL–CIO (the Union) filed the charge on June 24 and amended it on September 28, 1999.[1] On September 29, the complaint issued alleging that the Respondent, Newlonbro, LLC (Connecticut's Own) Milford, violated Section 8(a)(1) and (3) of the Act by terminating its employees Michael Frank and Howard Sachs on June 11 and 18, respectively. The complaint further alleges that the Respondent independently violated Section 8(a)(1) of the Act on June 12, when its supervisor/agent, Gregory D'Agostino, allegedly interrogated employees, created the impression that their union activities were under surveillance, and threatened employees with more onerous working conditions if they selected the Union as their bargaining representative. The Respondent filed its answer to the complaint on October 13 denying the unfair labor practice allegations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability corporation, is engaged in the retail sale and service of automobiles at its facility in Milford, Connecticut, where it annually derives gross revenues in excess of $500,000. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

The Respondent acquired the Milford dealership from its bankrupt former owner, an entity known as Volvo City West, in April 1997. Both Frank and Sachs were employed by the prior owner and were retained by the Respondent. At the time it acquired the business, the dealership sold new Mazdas, Volvos, and Oldsmobiles, as well as used, or "preowned," vehicles. In 1998, the Respondent stopped selling Oldsmobiles. Michael Brockman is the Respondent's managing member in charge of the day-to-day operations of the business. He has an office at the facility and is there most days. D'Agostino is the Respondent's Mazda and preowned sales manager who directly supervised Frank and Sachs. The Respondent admits that Brockman and D'Agostino are its supervisors and agents within the meaning of the Act.

Frank testified that Volvo City West hired him in April 1987 to sell used cars. Throughout his employment with Volvo City West, he sold only used cars, working out of a separate building from the main showroom. Even after the Respondent acquired the dealership and hired Frank, he continued selling only used cars out of the separate used-car office. For a time, he continued to be supervised separately from the new-car salesmen by D'Agostino, who was hired as the used-car sales manager in April 1997. In about May 1998, D'Agostino became the sales manager for both new Mazdas and preowned vehicles. From that point on, Frank was under the same supervision as the Respondent's Mazda new-car salesmen.[2]

According to Frank, he made it clear to the Respondent's management, at a sales meeting held soon after the Respondent acquired the business, that he was hired to sell used cars, that he only sold used cars and that he didn't like selling new cars. Although his memory of this meeting was vague, he did recall that someone from the Respondent's management responded, in effect, that they would take up that discussion at another

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Member Hurtgen does not agree with the judge's finding that the General Counsel has made out a prima facie case that employee Michael Frank's union activities were a motivating factor in the Respondent's decision to terminate him.

[1] All dates are in 1999 unless otherwise indicated.

[2] The Respondent's Volvo salesmen are supervised separately by the Volvo sales manager.

time. None of the Respondent's witnesses disputed this testimony. Frank also testified that, in about December 1997, after it was announced that the Respondent planned to merge the Mazda and the preowned sales departments, D'Agostino told Frank that he would not have to sell new cars after the merger. D'Agostino did not specifically contradict this testimony. In fact, as will be shown, he referred to such a discussion in a warning notice he gave to Frank on May 18. Nevertheless, despite this verbal "commitment," there is no dispute that Brockman and D'Agostino began asking Frank, in early 1999, to sell new cars. Frank testified that Brockman made this request several times and that each time he refused, telling Brockman that he preferred not to sell new cars. According to Frank, Brockman made these requests in a smiling, jovial manner. D'Agostino also asked Frank, in early 1999, to take "overflow" of new-car sales. Frank testified that he understood this to mean that, if all the new car salesmen were busy, he would greet new-car customers, show them the vehicles, answer their questions and generally keep the customer occupied until a new-car salesman was free, at which point he would turn the customer over to the new-car salesman to complete the sale. According to Frank, he agreed to do this voluntarily, without sharing any of the commission generated from any sales he initiated.

There is no dispute that, on May 18, D'Agostino gave Frank a written warning for "lack of new-car sales (Mazda)." On the warning report, D'Agostino wrote the following

> CT's Own Mazda-Preowned Sales Dept. consists of five sales personnal [sic]. At first Mick Frank was selling preowned vehicles only—Micky was told by Manager Greg D'Agostino that he was to take overflow of Mazda sales dept. He was told to take Mazda Sales tests and product test and never did. Since we have built a new showroom and is required to sell new Mazdas and pre-owned vehicles. Micky was told that he would be able to sell only pre-owned vehicles a 1-1/2 ago [sic] but since told to take overflow for Mazda that he is now required to sell both new Mazdas and pre-owned vehicles—everyone from Mazda—Pre-owned sales dept.—remaining four sales people sell both vehicle lines of cars—Mick Frank was hired as a sales consultant and refuses to sell new vehicles. Everyone in this dept. sells everything. Mick still refuses to sell new vehicles. Since this decision has been decided by employee taken out of pre-owned vehicle and put into service loaner [sic].

Before receiving this warning, Frank had been provided with one of the Respondent's newer preowned vehicles to drive as a demo. With the warning, this newer vehicle was replaced with a 1987 Oldsmobile that had 143,000 miles.

Frank testified that when he was given this warning, he asked D'Agostino if he could have some time to read the warning and write a response. D'Agostino agreed. Frank returned the warning on May 24 with the following response written in the "employee statement" section:

> 1-1/2 yrs. ago I was told I would only have to sell preowned cars when the pre-owned and Mazda dept. merged together. The demand at this time that I sell new cars I consider a breach of contract. Also taking away my newer demo's and giving me a 1987 Oldsmobile w/143,000 miles which I consider harassment by the company [sic].

According to Frank, he continued to take "overflow," as he understood that term, after receiving this warning. He acknowledged, however, that he continued *selling* only used cars.

Frank testified that he did not contact the Union about organizing the Respondent's salesmen until June 3. He spoke to the Union's secretary-treasurer, Dennis Novak, and set up a meeting at his house for June 6. According to Frank, approximately four employees were present, including him. Novak talked to the employees about the Union and cards were signed. Frank's card, which is in evidence, is dated June 4, indicating that he had already signed it before the meeting. Frank held another meeting at his house on Thursday, June 10, also attended by about four employees. The Union's International representative, Michael Markowitz, attended this meeting with Novak. According to Frank, in between the meetings, he talked to the other salesmen about joining the Union and solicited them to sign cards. Frank's testimony regarding his union activity was corroborated by Novak and by fellow salesmen Sachs and Vincent Pavone, each of who attended at least one meeting.[3]

Frank and Novak testified that, at the second meeting on June 10, it was decided that Frank would be the employee organizer and that the Union would fax a letter to the Respondent informing it of this decision. Such a letter was prepared the next morning, June 11, by the Union's office manager/secretary, Avis Kapitancek, who testified in these proceedings. According to Kapitancek, she typed the letter, affixed Novak's signature stamp and, at approximately 11:30 a.m., faxed it to the number given to her by Novak. Novak testified that he obtained the Respondent's fax number from Frank. After having her memory refreshed with the affidavit she gave on August 6. Kapitancek recalled that the fax number she used is the same as the Respondent's fax number. Kapitancek acknowledged that she had no written confirmation that the fax was received. She testified that the Union's fax machine does not generate such a confirmation, nor is it capable of printing any type of report that would show that the fax was sent. She was only able to verify that the fax was received by the Respondent by reading a digital readout on the fax machine at the time the fax was sent. The letter was also sent certified mail and the Union did receive the return receipt indicating that the Respondent got the letter on June 14. Despite the absence of any written proof that the fax was received, Brockman acknowledged in his direct testimony that he was aware, by early afternoon on June 11, that such a fax had been received from the Union. Brockman testified that he did not see the letter himself until around 5 or 6 p.m.

Frank testified that he went to the Union's office at lunchtime on June 11 to get a copy of the letter that was faxed to the Respondent. He then returned to the dealership. Shortly after 3 p.m., D'Agostino came to his desk and told Frank that Brockman wanted to see him. Before accompanying D'Agostino to

[3] Sachs testified that he attended both meetings. Novak testified that Sachs attended one meeting. Frank did not identify which employees were at either meeting.

D'Agostino to Brockman's office, Frank called Novak and told him that he was being summoned to Brockman's office. According to Frank, Novak told him to call if he needed him and that Novak would be at the dealership in 10 minutes.[4] Frank then accompanied D'Agostino to Brockman's office. Frank testified that the meeting was very stressful and he did not have a clear recollection of everything that was said. However he did recall Brockman opening the discussion with something to the effect that Frank had been asked to sell new cars and had continually refused. He recalled that he probably replied to this in the same manner he had previously, i.e., that he believed it was a breach of contract for the Respondent to ask him to sell new cars. At some point in the meeting he was handed another "Employee Warning Report" which he was asked to sign. Frank asked if he could take the warning with him, read it, and return it at a later time. He was told by either Brockman or D'Agostino that he had to sign it immediately or he would be terminated. An envelope was placed on the desk in front of him and Frank was told to open the envelope. Inside was a pink slip indicating that Frank was being terminated. The box for "willful misconduct" was checked as the reason for termination. Frank told Brockman and D'Agostino that he would not sign the warning and got up to leave. As he was leaving, he asked if he could write a response. He was told that he could. Frank then wrote his response in the employee statement section of the warning notice and was given a copy. D'Agostino then escorted Frank back to his desk. According to Frank, the meeting lasted about 15 minutes.

The June 11 employee warning notice was filled out and signed by D'Agostino. Under the "Company Statement," D'Agostino wrote:

> Mick Frank refuses to attend new-car Mazda meetings in which he was asked on June 8, 1999, to attend. These classes are required by Mazda and Mazda preowned certified, to sell all these vehicles.
>
> After several verbal warnings Micky has refused and failed to comply with company procedures to sell new vehicles. Everyone at CT's Own is hired to sell all types of vehicles which are provided by the automobile dealership.
>
> Micky refuses to cooperate and carry out the mandates of the company without any reason or explanation. These mandates apply to all personal in this position [sic].

Frank wrote the following employee statement:

> Employee read statement and said he would sign—return it after he had time to look over and reply.

Frank testified that D'Agostino told him that he would have to leave the dealership immediately. While D'Agostino went to get boxes for Frank to pack his belongings, Frank went to the Xerox machine and made copies of the union's letter to the Respondent identifying him as the Union's "inplant organizer." After he was done, he left the used-car office to go to Brockman's office in the main building in order to give Brockman a copy of the letter. On his way there, according to Frank, he encountered another salesman, Gerry LaFrenyear.[5] As he was telling LaFrenyear that he had just been terminated, D'Agostino came up to them, grabbed Frank by the arm, and pushed him back toward the used-car office, telling Frank that Brockman wanted him off the property immediately. Frank testified further that D'Agostino noticed the copies of the letter he was carrying and said that he had already talked to an attorney friend and that "it was already taken care of." Frank then packed up his belongings and was driven home by D'Agostino.[6] Frank testified that, as they were leaving, D'Agostino told him "soliciting is illegal." Frank testified further that, as D'Agostino was driving him home, He told D'Agostino to tell Brockman that "he was in deep s—t."

Frank acknowledged that, prior to his termination, D'Agostino had left faxes on Frank's desk regarding Mazda sales training classes that were offered at company expense. He admitted that he never signed up for any of these classes. He specifically recalled such a fax regarding a class on June 8 being left on his desk. He denied that D'Agostino, or anyone else in the Respondent's management, specifically asked him to attend that class. Frank also conceded on cross-examination that he was aware at least since the beginning of the year that the Respondent wanted him to sell new cars and that he was not interested in selling new cars.

It is undisputed that the Respondent had planned on merging the Mazda new and preowned sales departments into one showroom since December 1997. In 1999, the showroom was renovated and the new-car salespeople were moved into the used-car sales office where Frank worked during the construction. The evidence reveals that the new showroom was ready by June 11 and that all of the Respondent's Mazda new and preowned sales staff was scheduled to move into the new showroom on Saturday, June 12. The small building housing the used-car office had been set for demolition as part of the Respondent's planned renovations. The record reveals that the demolition of that building commenced the week following Frank's discharge.

Brockman testified that he made the decision to terminate Frank for the sole reason that Frank had refused to sell new cars. Although Brockman acknowledged being aware of the fax from the Union identifying Frank as its "inplant organizer" before he carried out the decision, he denied that the fax or Frank's union activities or sympathies played any part in his decision. According to Brockman, his decision had been made before he learned of the fax. Brockman and D'Agostino testified, as did Frank, that they had repeatedly asked Frank if he was going to sell new cars and that he consistently refused.

[4] Novak did not corroborate this testimony. Novak testified instead that he called the Respondent's dealership sometime during the afternoon of June 11 and asked to speak to Sciarroni, the Respondent's general manager, who was not available. According to Novak, he left his name and identified himself as a union representative, but he did not mention Frank, or the letter he had faxed earlier that day.

[5] Pavone testified that he also encountered Frank on the day he was terminated. Frank told Pavone he had just been fired. Frank then said to Pavone, "if you had attended the meeting last night, maybe this wouldn't have happened."

[6] Because Frank had been using a car provided by the Respondent, he did not have transportation home after he was terminated.

Brockman testified that, as part of the merger of the Mazda new- and preowned sales departments, the Respondent planned to have all—salesmen become certified to sell all of its products. To obtain such certification, it was necessary for the salesmen to attend classes and seminars sponsored by the manufacturers. The Respondent paid all expenses associated with such training. It is undisputed that Frank was the only one of the Respondent's salesmen who had not taken any steps to become certified. In fact, he was the only used-car salesman who refused to sell new cars.[7] The timing of the termination, according to Brockman, was related to the opening of the new showroom that Saturday, June 12, and not to the Union's nascent organizing campaign.

Brockman testified that, at the beginning of the week, he asked D'Agostino if Frank had acquiesced and decided to take the course to become certified to sell new cars. When D'Agostino told him that he had not, Brockman told D'Agostino that the time had come, before moving into the new showroom, to make a decision. On Friday morning, Brockman again asked if there was anything new with Frank. D'Agostino told him nothing had changed. In fact, another certification class had come and gone that very week without Frank signing up to attend. Brockman told D'Agostino to bring Frank to his office so Brockman could give him one last chance to conform to the Respondent's plans. Although Brockman testified that he asked D'Agostino in the morning, before lunch, to bring Frank up to–his office, he acknowledged that Frank and D'Agostino did not come up until after 3 p.m. He did not know why it took so long, but speculated that Frank may have been off the site for part of the time.

Brockman testified that he started the meeting by telling Frank that he thought he was a good salesman and that he wanted Frank to be part of the organization, but that Frank was the only salesperson who did not sell new and used cars. Brockman asked him again if he would sell new cars and again, Frank refused, citing a conversation from 1-1/2 years ago in which he was told he would not have to sell new cars. Brockman told Frank that he had never made that promise, but instead had repeatedly asked Frank to work with them and sell new cars. He repeated that Frank was a good salesman and he would like to have Frank sell new cars. He then told Frank that he could not have him be the only salesman who did not sell new cars, that it would not be fair to the other salesmen and would not fit in with the organization's plans. Frank again said something about having a verbal contract and Brockman again denied making such an agreement with him. Brockman asked one more time if Frank would acquiesce. Frank said he would not. Brockman then said, "[W]ell, if you won't sell new cars, then you won't have a place in our organization." At that point, D'Agostino gave Frank the warning notice and Brockman had Frank open the envelope containing the pink slip. Brockman confirmed Frank's testimony that he initially refused to sign the warning notice, and asked for time to read it over and prepare a response. He acknowledged that Frank was not given such an opportunity. Brockman testified that Frank did write a response before leaving the office, as shown on the warning notice. D'Agostino corroborated Brockman's testimony in most respects, although his testimony on the whole was not as clear and cohesive as that of Brockman. D'Agostino, unlike Brockman, often had to have his recollection refreshed with leading questions. On the whole, I did not find D'Agostino to be as convincing a witness as Brockman who struck me as generally credible.

D'Agostino did confirm Frank's testimony to some extent regarding what happened after they left Brockman's office on June 11. According to D'Agostino, after he escorted Frank back to his desk and left to get boxes, he saw Frank at the copier and then saw Frank leave the building and start handing out the papers he had copied. He acknowledged stopping Frank and telling him that he had to leave the premises immediately. He also admitted saying something about soliciting, although he did not testify what he said. D'Agostino denied seeing what was on the papers that Frank was handing out,[8] and he denied telling Frank that he had spoken to an attorney and that "it's already been taken care of."

The Union filed a petition seeking to represent the Respondent's Mazda new- and preowned salesmen on June 14, the Monday following Frank's termination. The following Friday, June 18, the Union leafleted at the entrance to the Respondent's facility with flyers informing the public that the Respondent was "unfair," accusing the Respondent of terminating Frank for trying to join the Union. The Union parked its tractor-trailer across the street from the facility throughout the day, playing music during the leafleting. On that same day, the Respondent terminated Sachs.

Sachs had worked for Volvo City West from October 1996 until the Respondent acquired the business in April 1997. He was hired by the Respondent and continued to work as a Mazda new-car salesman until his termination. There is no dispute that he was a good salesman. It is also undisputed that, throughout his employment by the Respondent, Sachs owned several condominiums and rental properties. Sachs hired contractors, insurance agents and rental agents to handle the day-to-day activities of this business. He acknowledged however that he occasionally received calls at the dealership from tenants and others related to this outside business. According to Sachs, when he received such a call, he immediately referred the caller to the appropriate person he had hired to handle the issue, e.g., a contractor to make repairs, or the rental agent to deal with tenant questions. He denied initiating any calls from the dealership related to this business and denied otherwise conducting any activities related to his rental business while on the Respondent's property during working hours.

Sachs also received an employee warning report from D'Agostino on May 18.

According to Sachs, when D'Agostino tried to give him the warning in his office, Sachs asked him what it was. Sachs told D'Agostino that he knew from his years in business that a "warning" was a way to document events before terminating an

[7] Pavone, like Frank, had been hired as a used-car salesman. Unlike Frank, Pavone complied with the Respondent's request that he take classes and become certified as a new-car salesman.

[8] At one point, D'Agostino testified incredulously that the papers Frank was handing out were blank.

employee.[9] D'Agostino responded that it was basically a progress report. Sachs told D'Agostino if that's what it was, then put that on the notice and D'Agostino complied with this request. In the warning report/progress report, D'Agostino wrote the following for the company's statement:

> 4–19–99 Last week of April Howard was taken out of his new car demo and put into a preowned older model used car service loaner. Howard has repeatedly not followed instructions—sales procedures, quoting prices from cost without checking with a manager.
>
> 5–17–99 Since warning Howie has improved in communicating with managers and has tried to follow sales procedures. Howie will receive another type of demo preowned at this time.

Sachs acknowledged that D'Agostino had discussed his violation of sales procedures in April and had taken away his new demo at that time as a form of punishment, as reflected in the May 18 warning/progress report. When D'Agostino gave him this warning/progress report, Sachs refused to sign it, requesting time to prepare a written response. Sachs submitted his response on a separate sheet of paper and signed the warning/progress report on May 24. In his statement, Sachs disputed the allegation that he "repeatedly" failed to follow sales procedures and complained about defects in the old service loaner he was given as "punishment." Sachs also highlighted his sales performance and committed himself to work to the best of his ability to promote the Respondent's business.

As noted above, Sachs attended at least one, if not both, union meetings at Frank's house before Frank's termination. He signed a union authorization card on June 4, the same date as Frank. Sachs did not engage in any other union activity and did not openly display his support for the Union at work. Sachs' usual day off was Friday so he was not at work when Frank was terminated. He learned of Frank's termination when he came into work, in the new showroom, on June 12.

Sachs testified that, soon after he arrived at his new desk on June 12, Pavone called him over to his desk. Pavone told Sachs that Frank had been fired for union activity. While he and Pavone were talking, D'Agostino came over and said, "I understand you went to the Union meeting." When Sachs asked, "What makes you say that," D'Agostino replied, "I know you went to the Union meeting. I understand there were just two people there." Sachs asked, "who." D'Agostino replied, "you and Micky." When Sachs then admitted that he had been at the meeting, D'Agostino asked, "why would you want to go to a meeting and hurt the company?" Sachs disagreed that he was hurting the company by going to the meeting, insisting that he always tries to promote the company. D'Agostino then said, "[Y]ou know, with Micky gone, you must be the new Union rep." Sachs told D'Agostino that he was crazy, that Sachs was not a union rep. According to Sachs, D'Agostino changed the subject somewhat by telling him that if there were a union at the dealership, the salesmen would probably have to punch a timeclock and if they punched in late two or three times, it could be reason for dismissal. Initially, Sachs testified that that was the end of the conversation. However, after the General Counsel refreshed his recollection through a leading question, Sachs recalled that D'Agostino ended the conversation by saying that, if a union got into the dealership, he would quit. Sachs testified that, after making this statement, D'Agostino walked away. Sachs also testified that, after D'Agostino left, he asked Pavone how D'Agostino knew about the union meeting. Pavone told Sachs that D'Agostino probably was "fishing," that he really didn't know.

The Respondent called Pavone as a witness. He appeared voluntarily without a subpoena. He is still employed as a salesman by the Respondent, selling Mazda new- and preowned vehicles. Pavone testified that he probably told Sachs on June 12 that Frank had been fired the previous day because he knew that Sachs was not at work that day. However, he emphatically denied telling Sachs that Frank had been fired for union activities. Pavone testified that he was certain of this because he believed that Frank had been let go for refusing to sell new cars. In response to leading questions from Respondent's counsel, Pavone also denied hearing D'Agostino make any of the statements attributed to him by Sachs. He testified further that he did not recall seeing Sachs talking to D'Agostino that day. He conceded that Saturdays are a busy retail day for the salesmen and that he may have been away from his desk, but he had no recollection of witnessing any conversation similar to that described by Sachs. On cross-examination, Pavone testified that he had only been contacted by the Respondent's counsel and questioned about this incident the night before his testimony, 7 months after it allegedly occurred.[10]

D'Agostino denied seeing Sachs speaking to Pavone on the morning of June 12 and denied having any conversation with Sachs about the Union or Frank's discharge. In response to leading questions from Respondent's counsel, D'Agostino also denied making any of the statements attributed to him by Sachs. D'Agostino further denied having any knowledge regarding Sachs' union activities or sympathies before he was terminated.

Sachs testified that he was away from the dealership, attending a Mazda sales seminar on the afternoon of June 17. Although he did return to the dealership late that afternoon to bring back a fellow salesman who had to pick up his car, he did not recall if he stayed and performed any work. The following day, June 18, was a Friday. Although Friday is Sachs' usual day off, he had arranged to go in to handle a delivery of a new car to a customer that morning. Sachs testified that he was at the dealership from about 9 to 11 a.m. on June 18, taking care of the delivery. While he was there, D'Agostino handed Sachs a slip of telephone messages that had been left for Sachs on the Respondent's voicemail during the night from a woman named Flora. D'Agostino told Sachs that one of his tenants had called

[9] Before getting back into the car business in about 1995, Sachs spent many years in the garment industry, rising to the rank of vice president with a major apparel company.

[10] The General Counsel attempted to show on cross-examination that the Respondent's counsel violated the Board's guidelines for such questioning. See *Johnnie's Poultry Co*., 146 NLRB 770 (1964). Although Pavone testified that he could not recall if counsel gave him any assurances against reprisals by the Respondent, the General Counsel did not seek to amend the complaint to allege any further violation of the Act based on this questioning.

several times in the middle of the night. Sachs looked at the messages and told D'Agostino that Flora was not one of his tenants. At the time he did not know who she was. Although his memory was not entirely clear, he was reasonably certain that D'Agostino did not give him any warning reports before he left the dealership at 11 a.m. Sachs testified that D'Agostino called him at home about 2 p.m. that afternoon, telling Sachs that one of his deals was messed up and that he needed to come back to the dealership to straighten it out. Sachs told D'Agostino that he couldn't come back, because he had a house full of people and was busy preparing for an event involving his granddaughter. D'Agostino insisted that Sachs return and Sachs ultimately agreed. According to Sachs, he returned to the dealership at about 3:30 p.m. He was met by D'Agostino who took him to the old used-car office that was in the process of being demolished. D'Agostino pointed to a cardboard box in the corner and said, "there's your stuff, we can't go on this way anymore, you're fired . . . you can't do business on company time." After a discussion over who packed the box and whether it contained all of Sachs' belongings, he and D'Agostino went back to D'Agostino's office. According to Sachs, it was at this point that D'Agostino handed him three warning reports and a pink slip, all dated June 18.

Each of the warning reports documents an incident of Sachs allegedly conducting personal business on companytime. Two were prepared and signed by D'Agostino. The third, which relates to the telephone messages left by Flora during the night between June 17 and 18, is unsigned and in a different handwriting. The telephone message slips which Sachs recalled receiving earlier that morning were attached to this warning notice. D'Agostino did not recognize the handwriting and did not know who prepared this warning report. The first report prepared by D'Agostino describes a telephone call for Sachs that D'Agostino intercepted on Thursday evening, June 17, when Sachs was away from the dealership. In the warning report, D'Agostino writes that Sachs had been warned verbally several times about conducting business related to his rental properties on companytime and that, despite these warnings, he had received a numerous amount of calls over the past several months on rental properties." In the warning report, D'Agostino wrote that on June 17, at 7:45 p.m., he received a call for Sachs from an individual who identified himself as a tenant of Sachs. He left a number for Sachs to call him. When D'Agostino asked if he could help the caller, the caller told D'Agostino no, to have Sachs call him. D'Agostino also referred to the prior warning he had given Sachs regarding his sales procedures. The third warning report, dated June 18, and the second one prepared by D'Agostino, relates to the receipt at the dealership of a fax for Sachs from his insurance agent regarding the premium on one of his properties. In this warning report, D'Agostino wrote that the fax was received at 1:20 p.m. on June 19, an obvious error. A copy of the fax, which is in evidence, shows that it was received on June 18. D'Agostino summarized his decision on the warning report as follows:

> This type of other interests and other business cannot be happening any more on company time. Howard is to sell automobiles not conduct rental business anymore on company times.
>
> Howard has ignored numerous written and verbal warnings in regards to conducting his outside personal business on company time. The egregious attitude he has displayed in this matter shows me that he will not comply with our previous directions. Therefore he is immediately dismissed—terminated. [Sic.]

The reason for discharge indicated on the pink slip given to Sachs with these warning reports is "conducting personal business on company time."

Sachs disputed the claim in the warning reports that he had previously been warned about conducting business on companytime. Sachs testified that D'Agostino would sometimes question him when he saw him on the phone and ask whom he was speaking to. At times, D'Agostino asked, "is this your tenants' line?" Sachs would generally respond by asking if D'Agostino wanted to get on the phone to see whom he was speaking to. According to Sachs, he was unaware of any prohibition on employees making or receiving personal calls at work. Sachs also testified that several other salespeople had outside interests that they pursued while at the dealership. One salesman was a musician who set up rehearsals and gigs. Another salesman had a wife who owned a beauty parlor and he ordered supplies for her from work. A third salesman had a vending machine business and had some of his machines at the dealership. Sachs denied that his ownership of rental properties interfered with the performance of his job as a salesman for the Respondent. According to Sachs, it actually helped him because it provided an opportunity to network, hand out his business cards, and otherwise prospect for potential sales of cars. Sachs testified that he also sold vehicles to people with whom he came in contact through his rental properties.

Brockman testified that he was involved in the decision to terminate Sachs, but that he left it up to D'Agostino to make the decision. Brockman denied any knowledge of Sachs' union activities or sympathies at the time the decision was made. According to Brockman, D'Agostino reported to him the several incidents on June 17 and 18 involving the telephone calls and fax that came into the dealership related to Sachs' rental business. Brockman testified that, after D'Agostino gave him the details, he told D'Agostino to use his discretion, that if D'Agostino felt these events were reason for termination, to terminate Sachs. Brockman testified that he himself believed the events of June 17 and 18 were sufficient reason to terminate Sachs. Brockman also described another conversation with D'Agostino, some months earlier, in which D'Agostino told him that Sachs was receiving a lot of phone calls at the dealership related to his rental properties. Brockman told D'Agostino at that time that this was unacceptable. He instructed D'Agostino to take care of it. Brockman testified that the Respondent has an unwritten "policy" against employees having second jobs. He described two other employees who held second jobs that impacted their performance for the Respondent, a parts department employee and a receptionist. According to Brockman, he talked to the employees about their reason for working another job and offered them a raise so that they would

not have to work two jobs. Brockman admitted that neither employee was disciplined. Although Brockman acknowledged being aware that one of the salesman was a musician and that the wife of another owned a beauty parlor, he denied being aware that either had conducted business related to these activities at the dealership. With respect to the salesman who owned the vending machines, Brockman testified that he told the salesman that it was a conflict of interest and he had the vending machines removed when he became aware of this arrangement. Brockman testified further that the Respondent no longer employs the salesman who owned the vending machines. He did not testify when these events occurred.

D'Agostino, who also denied any knowledge of Sachs' union activities or sympathies, testified that the events leading up to the decision to terminate Sachs started with a telephone call he received on Thursday evening, June 17, from one of Sachs' tenants. According to D'Agostino, he picked up the phone when he heard the operator page Sachs three times, believing that it might be a potential sales call. He introduced himself and asked the caller if there was something he could help him with for Sachs. The caller said no. D'Agostino asked if he was calling about an automobile and the caller said no, that he was a tenant of Sachs and needed to talk to Sachs. He left a phone number where Sachs could reach him. D'Agostino testified on direct that he wrote up the warning report about this call and gave it to Sachs the next morning, around 10 or 11 a.m.

D'Agostino testified that the same day, June 18, after he had given the first warning report to Sachs, a fax was received on the fax machine in his office addressed to Sachs from an insurance agent. The subject of the fax was the insurance premium on one of Sachs' properties. In addition, according to D'Agostino, he received telephone message slips from someone in the upstairs office indicating that one of Sachs' tenants had called three or four times around 2 a.m. complaining about a disturbance at his building. D'Agostino recalled that he received these slips about the time of the fax. D'Agostino then spoke to Brockman about these developments. According to D'Agostino, they reached the conclusion that Sachs was conducting a business on companytime. Brockman told D'Agostino, "do what you think is right." D'Agostino then finished writing up the warning report related to the fax and carried out the termination. D'Agostino did not specifically dispute Sachs' description of the way in which the termination was carried out.

D'Agostino also testified that he had spoken to Sachs several times previously about conducting his rental business at work. According to D'Agostino, when the salesmen were sharing the smaller quarters in the used-car building during the showroom renovation, he often heard Sachs' on the phone talking to tenants. He routinely told Sachs on these occasions, "you can't conduct business" or to "knock it off." D'Agostino testified that he was unaware of any other salesman conducting outside business while in the dealership. He acknowledged that he was aware of unsolicited menus being faxed to the dealerships from restaurants in the area and that the salesman ordered food via the fax machine on occasion. D'Agostino also conceded that the Respondent did not have any rules regarding making or receiving personal calls.

On cross-examination, D'Agostino's testimony about the sequence of events leading up to Sachs' termination became somewhat muddy. As the General Counsel poked holes in D'Agostino's direct testimony, he became less certain of his answers and more and more confused. It became clear, on cross-examination, for example, that D'Agostino did not give any prior written warnings to Sachs about his rental business and that he did not give Sachs any of the three warnings on the morning of June 18, while Sachs was at the dealership handling the delivery. As with his testimony regarding Frank, D'Agostino was not very convincing.

As noted above, the Union filed a petition seeking to represent the Mazda new- and preowned salesmen employed by the Respondent on June 14. On June 24, the Respondent and the Union signed a Stipulated Election Agreement setting the date for the election on July 16. The Union lost the election by a four to zero vote, with two challenged ballots, i.e., those cast by Frank and Sachs. It is undisputed that the Respondent did not conduct any campaign to encourage its employees to vote against the Union during the preelection period.

B. Analysis and Conclusions

1. The 8(a)(1) allegations

The 8(a)(1) allegations of the complaint are based on the testimony of Sachs regarding D'Agostino's statements to him on the morning of June 12. Although Sachs testified that the statements were made in front of Pavone's desk with Pavone present, Pavone did not corroborate Sachs. As noted above, D'Agostino denied that any such conversation occurred. This allegation is the key to the General Counsel's case. If Sachs testimony is credited, then the statements made by D'Agostino would satisfy the General Counsel's burden of establishing knowledge and animus in support of the 8(a)(3) allegations. If Sachs is not credited, then there is no evidence of animus and no evidence of knowledge of Sachs' union activities or sympathies.

As already noted, I was not impressed with D'Agostino's overall testimony. He appeared to have a poor memory of events, frequently became confused and generally appeared to be less than candid about his knowledge of the Union. As will be discussed in greater detail below, his testimony regarding the reasons for Sachs' termination contained many inaccuracies and exaggerations that undermined his testimony. While Sachs also had some difficulty with recall of certain events, his overall demeanor was more impressive. His testimony about this particular conversation did not appear to be a fabrication. The fact that Pavone did not corroborate Sachs is troubling because I found him to be credible in many respects. At the same time, I note that Pavone is still employed by the Respondent and that he was placed in the unenviable position of having to testify whether his current supervisor had threatened a discharged employee. He was asked to do this apparently without being given any assurances that his employer would not take any action against him based on his testimony. Pavone candidly acknowledged that the thought of retaliation had crossed his mind when he was questioned the previous evening by the Respondent's attorney. Under the circumstances, his failure to corroborate Sachs is not surprising. I also note that his denials

of the alleged unlawful statements of D'Agostino were elicited entirely through leading questions and that when asked more open-ended questions, he professed a lack of recall. On balance, after considering the testimony, the demeanor of the witnesses and the credibility factors, just noted, I find that Sachs' testimony is the more credible and that the conversation did occur as he described it on the morning of June 11.

The complaint alleges that D'Agostino's statements to Sachs violated the Act in three distinct ways. I agree with the General Counsel that D'Agostino's statements that he understood that Sachs had gone to the union meeting and that there were just two people there, Sachs and Frank, would reasonably lead an employee to believe that the Respondent had kept its employees' activities under surveillance *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999), and cases cited therein. See also *Ichikoh Mfg. Inc*., 312 NLRB 1022, 1023 (1993). D'Agos-tino followed up this impression by questioning why Sachs would go to a union meeting, activity which D'Agostino equated with hurting the company. Such questioning of an employee regarding his reasons for supporting a union constitutes unlawful interrogation when considered in the context of the entire conversation. See *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). D'Agostino then unlawfully threatened Sachs that selection of the Union would result in more onerous working conditions by telling him that the salesmen would probably have to punch a timeclock and would risk dismissal if they were late two or three times. See *Schaumburg Hyundai, Inc*., 318 NLRB 449 (1995). Accordingly, l find that the Respondent violated Section 8(a)(1) of the Act on June 12, as alleged in the complaint.

2. The 8(a)(3) allegations

The complaint alleges that the Respondent terminated Frank and Sachs, in violation of Section 8(a)(1) and (3) of the Act, because of their union membership, activities, and support. In cases such as this, that turn on employer motivation, the Board applies the test it established in *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel must first show, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's conduct. On such a showing, the burden shifts to the employer to prove that it would have taken the same action even in the absence of the protected conduct. To sustain his initial burden, the General Counsel must show: (1) that the employee was engaged in protected activity; (2) that the employer was aware of this activity; and (3) that activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a question of fact. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999), and cases cited therein. With respect to the employer's burden under *Wright Line*, the Board has said that it is not enough to show that it had a legitimate reason for imposing discipline against an employee. The employer must demonstrate that the same action would have been taken even without the protected conduct. *Hicks Oils & Hickspas*, 293 NLRB 84, 85 (1989).

a. Michael Frank

The evidence in the record clearly establishes that Frank had engaged in protected conduct before his termination. His testimony that he talked to his fellow employees about joining the Union was corroborated by Sachs and Pavone. These witnesses also corroborated his testimony that Frank held two meetings at his house where employees had the opportunity to meet with union representatives, with the second meeting being held the night before his termination. Novak corroborated Frank's testimony that Frank was the initial employee contact and was designated to be the "inplant organizer" for the Union prior to his termination. All of this testimony was not contradicted by any of the Respondent's witnesses.

With respect to knowledge, the evidence establishes that the Union faxed a letter to the Respondent on June 11, the day Frank was terminated, identifying him as the "inplant organizer." Any doubt whether that fax was actually received by the Respondent was eliminated by Brockman's testimony that he had been informed of the contents of the letter by early afternoon, before he met with Frank to terminate him. In addition, the credited testimony of Sachs above regarding D'Agostino's statements on June 12 establishes that Frank's immediate supervisor was aware of his involvement in the Union.

D'Agostino's statements to Sachs, which I have already found to be unlawful, establishes the Respondent's antiunion animus. This, however, is the only evidence of animus in the record. In particular, the record contains no evidence that Brockman, the individual who made the decision to terminate Frank, had exhibited any antiunion animus. Moreover nothing in the statement of D'Agostino the morning after Frank's termination can be considered an admission of unlawful motivation. He merely informed Sachs that he knew who was involved with the Union, that they had had a meeting with union representatives and that, with Frank gone, Sachs would probably be the union representative. Thus, this conversation does not provide General Counsel with the "smoking gun" to prove that Frank was fired for union activities. See *Alexian Bros. Medical Center*, 307 NLRB 389 (1992).

As noted above, the General Counsel may rely on circumstantial evidence, such as timing, disparate treatment, or shifting reasons for the employer's action, to prove unlawful motivation when direct evidence is absent. The General Counsel has taken this approach here, emphasizing the timing of Frank's discharge on the very day that the Respondent was informed of Frank's leading role in the Union's organizing campaign and the seemingly abrupt manner in which the termination was effectuated. The General Counsel also relies on the absence of any written rules, or disciplinary policies as somehow making the Respondent's actions suspect. I find this latter argument unpersuasive as there is no requirement under the Act that an employer have written rules or policies regarding discipline. The only requirement under the Act is that any discipline imposed must be free of any unlawful motivation. An employer is always free to exercise its discretion in a nondiscriminatory manner with respect to issues of employee discipline.

Having considered the above, and all of the evidence in the record, I find that the General Counsel has made out a strong prima facie case that Frank's union activities were a motivating

factor in the Respondent's termination of Frank. The element of timing, in particular, strongly supports an inference that Frank's designation as inplant organizer, which Respondent knew about before his termination, motivated his apparently hasty termination. The fact that D'Agostino openly displayed his opposition to the Union the day after he participated in the decision to terminate Frank is another factor supporting such an inference. This finding shifts the burden to Respondent to prove that Frank would have been terminated in any event.

Although not entirely free from doubt, I am convinced by the weight of the evidence that Respondent would have terminated Frank on June 11 even in the absence of union activity because of his adamant and persistent refusal to comply with the Respondent's reasonable request that he sell new cars.[11] The record contains undisputed evidence that the Respondent had requested Frank to sell new cars, and had even issued him a written warning for failing to sell new cars, before he engaged in any union activity. The warning he received on May 18, made it clear that the Respondent expected Frank to take the steps to become certified to sell new cars and to begin selling new cars now that the new- and used-car departments were merged. Despite this clear warning. Frank continued selling only used cars and ignored faxes left on his desk regarding the certification classes. While it is true that the Respondent apparently tolerated Frank's noncompliance for some time, the decision to give him an ultimatum coincided with the opening of the new showroom and the demolition of the old used-car office. At that point, it was understandable that the Respondent would reach the conclusion that it could no longer retain an employee who refuses to cooperate with its organizational plans. I thus credit Brockman's testimony regarding his reasons for the decision to terminate Frank and the sequence of events leading up to the termination.

The General Counsel suggests that Frank was treated disparately because he wasn't given an opportunity to review the final warning notice he received and to prepare a response. I do not agree. This was not a new issue between Frank and the Respondent. He had been given numerous opportunities to respond in the past, including when he received the first written warning on May 18. Moreover, since he had already told the Respondent in the meeting on June 11 that he was not going to sell new cars, what was to be gained by giving him an opportunity to write a response? I am convinced that the Respondent would have acted in the same manner had Frank not been involved with the Union. The timing of the decision was motivated more by the opening of the new showroom than the designation of Frank as the Union's employee organizer. See *Publisher's Printing Co*., 317 NLRB 933 (1995); *C. I. Whitten Transfer Co*., 309 NLRB 610, 626–627 (1992).

Having found that the Respondent carried its *Wright Line* burden, I shall recommend that this allegation of the complaint be dismissed.

b. Howard Sachs

The evidence in the record establishes that Sachs was involved in protected activity before his termination. He testified that he attended two meetings and signed a union authorization card. Novak corroborated the fact that Sachs had attended at least one meeting.

The Respondent offered no contradictory evidence. Knowledge of Sachs' union activities and support is established by his credible testimony that D'Agostino identified him as one of only two employees who attended a union meeting. In that same conversation, D'Agostino indicated his belief that Sachs was one of the leaders of the union drive by stating that, with Frank gone, Sachs would be the Union Representative D'Agostino's equation of Sachs' attendance at a union meeting with harm to the company, as well as his threats of more onerous working conditions, establishes the requisite antiunion animus. In addition, the circumstances of Sachs' termination support an inference that his union activity was a motivating factor in the hasty decision to let him go.

The record clearly establishes that Sachs was terminated for "conducting personal business on company time" without any prior warning that such conduct would lead to termination. The only previous documented warning Sachs received related solely to his failure to follow sales procedures. Moreover, the "Warning Report/Progress Report" in evidence shows that, by May 18, Sachs had corrected this problem. The May 18 warning is totally silent on the issue of Sachs' outside business interests. One would assume that, if his conduct of personal business on companytime had been such a longstanding problem for the Respondent, D'Agostino would have mentioned it in the "Progress Report" he gave Sachs on May 18. I do not credit D'Agostino's testimony that he verbally warned Sachs on numerous occasions that he was not to conduct personal business on companytime. As with much of his testimony on this issue, D'Agostino grossly exaggerated the frequency and significance of his conversations with Sachs over his use of the phone. I credit Sachs testimony that it was rare for him to receive a telephone call at work regarding his rental units and that he never initiated any such calls. I also credit Sachs' version of those few exchanges he had with D'Agostino in which D'Agostino asked him who he was talking to on the phone.

In addition, the Respondent's decision to terminate Sachs after the three incidents occurred on June 17–18 was made hastily without any investigation. Sachs was not even given an opportunity to respond to the allegation that he was conducting personal business on companytime before he was terminated. Instead, he was called back to the dealership on his day off, handed three warnings at the same time he received a pink slip, and then given his belongings in a box that had already been packed for him. The Board has frequently relied on circumstances such as these to infer unlawful motivation. See *Lancer*

[11] Frank apparently believed that he had a verbal contract under which he could only be required to sell used cars. Even assuming there was such an agreement, nothing in the Act prohibits an employer from unilaterally changing the terms and conditions of employment of its unrepresented employees. Moreover, any breach of this agreement occurred long before any union activity when Brockman began asking Frank to sell new cars around the first of the year. Certainly, by the time he received the May 18 written warning, and before any union activity commenced, the Respondent made it clear to Frank that it no longer intended to abide by this verbal "agreement". The record thus does not support any contention that the Respondent reneged on any verbal commitment it made to Frank because of his union activity.

Corp , 271 NLRB 1426, 1427 (1984), enfd. 759 F.2d 458 (5th Cir. 1985). See also *W. W. Grainger v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978). The Respondent's harsh treatment of Sachs for this alleged infraction was also starkly different from the way it treated other employees who held outside employment. Rather than talk to Sachs about the problem and try to work out a way for him to continue his employment with the Respondent without the need for a second source of income, as it did with two other employees, the Respondent abruptly fired him. This strongly suggests that something other than the telephone calls and messages from tenants and the fax from Sachs' insurance agent were motivating the Respondent's actions on June 18. In this regard, I note that the decision was made to terminate Sachs on the same day that the union tractor-trailer was parked across the street and its members were leafleting the Respondent's customers in protest of Frank's discharge.

Finally, I note that the asserted reason for Sachs' termination does not withstand even minimal scrutiny. The Respondent claimed that Sachs was conducting personal business on "company time" even though the June 17 telephone call from his tenant, the 34 messages left for Sachs on the Respondent's voicemail overnight and the fax received at the dealership from his insurance agent on June 18 all occurred at times when Sachs was not even working! The Respondent offered no evidence that Sachs initiated these communications to the dealership, or that he otherwise took time away from his work as a salesman while at the dealership to handle matters related to his rental business. This and the other circumstances noted above are sufficient to satisfy the General Counsel's burden of proof that protected activity was a substantial or motivating factor in the Respondent's decision to terminate Sachs.

I conclude further that the Respondent has not carried its burden of proving that it would have terminated Sachs for the events of June 17–18 in the absence of protected activity. Unlike Frank, the issue of Sachs' outside business interests was not a longstanding dispute with documented warnings predating his union activity. Rather, it appears that there was no issue, until the events of June 17 and 18 and that the Respondent seized on these events as a pretext to rid itself of the individual whom it believed was the sole remaining union supporter.

The same circumstances cited above which support the inference of unlawful motivation establish the pretextual nature of the asserted reason for discharge. I find that, based on its treatment of other employees, the Respondent would not have fired Sachs after receiving the telephone calls and fax in the absence of union activity. On the contrary, it would have confronted him about these matters, determined the extent of his involvement in the calls and fax[12] and sought to work out a compromise under which he could have continued working for the Respondent without his outside business interfering with the performance of his sales. The Respondent acknowledged that Sachs was a good salesman and his rental business had, in fact, generated sales of automobiles. Thus, it was in the Respondent's interest to retain him.

Having found that the Respondent failed to rebut the General Counsel's prima facie case. I conclude that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, when it terminated Howard Sachs on June 18.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their union sympathies, by creating the impression that employees' union activities were under surveillance, and by threatening employees with more onerous working conditions if they selected the Union as their bargaining representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating Howard Sachs on June 18, 1999, because he joined, supported, or assisted the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. The Respondent has not engaged in any other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, in order to remedy the unlawful discharge of Sachs, the Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Newlonbro, LLC (Connecticut's Own) Milford, Milford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee about union support or union activities.

(b) Creating an impression among its employees that their union activities were under surveillance by the Respondent.

(c) Threatening its employees with more onerous working conditions if they select a union as their collective-bargaining representative.

[12] For example, the woman who called during the night to complain about a disturbance was not even one of Sachs' tenants. The Respondent did not even take the time to find out who she was or why she was calling Sachs at the dealership. Similarly, the Respondent made no attempt to find out if the fax from the insurance agent was sent to the dealership by mistake or intentionally at the direction of Sachs. There is no dispute that the Respondent had no established policy prohibiting making or receiving personal phone calls and unsolicited faxes were not uncommon at the dealership.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Discharging or otherwise discriminating against any employee for supporting Local 1040, International Brotherhood of Teamsters, AFL–CIO or any other union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Howard Sachs full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Sachs whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Milford, Connecticut, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[14] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT make statements that create the impression that we have your union activities under surveillance.

WE WILL NOT threaten you with more onerous working conditions if you select a union as your collective-bargaining representative.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 1040, International Brotherhood of Teamsters, AFL–CIO or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Howard Sachs full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Howard Sachs whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Howard Sachs, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NEWLONBRO, LLC (CONNECTICUT'S OWN) MILFORD